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REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

Replies by States and regional groupings on steps taken to meet their commitment to the Set of Principles and Rules

Note by the UNCTAD secretariat

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I. INTRODUCTION

1. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, in section G, provides that "States which have accepted the Set of Principles and Rules should take appropriate steps at the national or regional levels to meet their commitment to the Set of Principles and Rules". Further, in section F, the Set provides for "communication annually to the Secretary-General of UNCTAD of appropriate information on steps taken by States and regional groupings to meet their commitment to the Set of Principles and Rules, and information on the adoption, development and application of legislation, regulations and policies concerning restrictive business practices".

2. As in previous years, the Secretary-General of UNCTAD, in a note dated 13 April 1992 (TD/420/8(6)), requested States and regional groupings to provide the above-mentioned information not later than 1 June 1992. In the note, the Secretary-General reiterated the secretariat's statement made during previous sessions of the Group that this information should concentrate on developments directly relevant to the implementation and application of the Set by member States, for example: (i) the introduction of new RBP legislation; (ii) the revision and/or amendment of existing RBP legislation to bring it into line with the Set; (iii) the translation and dissemination of the Set and the organizing of contacts with business circles to ensure its effective application; (iv) the exchange of information with foreign RBP control authorities to strengthen RBP controls; (v) notifications of, and action taken against, RBPs which adversely affect foreign countries and which originate in enterprises under the notifying country's jurisdiction; (vi) consultations between countries on matters related to the control of RBPs, with a view to reaching understandings; (vii) the organization of, participation in, or provision of financial and other resources for technical assistance and advisory and training programmes on restrictive business practices, particularly for developing countries.

3. The information received is therefore reproduced and submitted to the eleventh session of the Intergovernmental Group of Experts on Restrictive Business Practices for its annual review of the operation of and experience arising from the application and implementation of the Set. The present note contains replies received, as of 9 July 1992, from the following States: Australia, Belgium, Bolivia, Chile, Cyprus, Czechoslovakia, Finland, Germany, Greece, India, Japan, Mauritius, Norway, the Philippines, Portugal, Sri Lanka, Turkey and the United Kingdom, as well as from the Commission of the European Communities.

II. REPLIES FROM STATES

AUSTRALIA

4. The Government of Australia submitted its annual report for 1990-1991 on developments in competition law and policy, containing, inter alia, the information reproduced below.

NEW LEGAL PROVISIONS

5. The major legislative development was the commencement on 1 July 1990 of the Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990 which inserted a new section 46A into the Trade Practices Act extending the prohibition on misuse of market power provision to trans-Tasman conduct. This development was dealt with in last year's report.

6. Legislative developments this year concern the amendment of the mergers and the acquisition section (section 50) to expand the prohibition against a corporation achieving or extending a position of market dominance to specifically cover acquisitions by bodies corporate which are not corporations. New section 50 (1AA) prohibits a body corporate which is related to or associated with a corporation from acquiring shares or assets in another body corporate if as a result of the acquisition the corporation would be or would be likely to be in a position to dominate a substantial market for goods or services, or would have an existing position of dominance substantially strengthened.

7. The amendments were initiated in response to the judicial interpretation of "indirect acquisition" in subsection 50 (1) in the New Zealand Steel Case which confirmed that the phrase was limited to an acquisition by someone acting as an agent, but did not extend to an acquisition made by a subsidiary or associated company where it could not be said to be acting as an agent.

8. Amendments to the Trade Practices Act which have passed the House of Representatives and are currently before the Senate will empower the Trade Practices Commission to impose charges for certain services and publications it sells.

Related measures

9. As discussed in the Regulation Trade and Industrial Policy segment of this report (below), network competition is being introduced through the licensing by the end of 1991 of a private sector network competitor to the publicly owned Australian and Overseas Telecommunications Corporation. Pro-competitive safeguards are being implemented, including equal access and interconnection between the carriers. The regulatory framework to give effect to this is contained in the Telecommunications Act 1991 (No. 98 of 1991).

Possible future changes

10. A number of major proposals concerning reform of competition law have been agreed to by Government and have been put forward for consideration by the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee). They include:

- Reintroduction of the private right to seek injunctive relief to restrain anti-competitive mergers;

- Introduction of a prohibition on unconscionable conduct in commerce designed to better protect small business;

- An administratively simple pre-merger notification scheme designed to give the Trade Practices Commission adequate opportunity to examine mergers before they take place, while at the same time ensuring that the Trade Practices Act places minimum impediment in the way of business - this scheme will allow mergers to proceed prior to the grant of authorization on the basis of enforceable undertakings given to the Trade Practices Commission, as an alternative to requiring authorization prior to merger;

- Substantially increased maximum pecuniary penalties of $10 million for bodies corporate and $500,000 for individuals for breaches of sections 46 and 50 of the Act; and

- Enhanced remedies for the Trade Practices Commission and private litigants.

International trade

11. Section 5 of the Trade Practices Act currently provides for a limited extraterritorial operation of the Act in the circumstances set out in that section. It is recognized that this extraterritorial application of the Trade Practices Act may impinge upon foreign laws or policies in operation in the country where the conduct took place. In the case of government initiated proceedings under the Act, it is possible for the Government to take account of the foreign country's interest and to engage in consultations with the foreign Government if necessary. However, in the case of private proceedings such government consultations cannot take place. To remedy this, subsection 5 (3) and (4) provide that a person may neither rely on extraterritorial conduct nor seek an order in relation to that conduct without prior consent of the Attorney General.

12. The Department processed a number of these "section 5" requests for the Attorney General's consent to the use of extraterritorial conduct by private litigants in proceedings under the Trade Practices Act during the year. The Department advised the Attorney General on the question of whether the conduct allegedly contravening the Trade Practices Act was required or specifically authorized by the law of the relevant foreign country and if there were comity or other considerations relevant to the Attorney General's decision to grant a consent.

13. Secondly, the Department monitored United States anti-trust developments that could be relevant to Australian international trade. These developments included a proposal in the last Congress to abolish the foreign sovereign compulsion defence. The Department has been concerned by the trend in the United States Congress to include "national preference" provisions in anti-trust amendments (provisions discriminating against foreign investors: for example the Joint Production Venture Legislation [House of Reps No. 1604]).

14. The Department has examined foreign "abuse of market power" provisions and remedies, including the level of civil penalties for the purposes of an Australian Senate Enquiry into the adequacy of the Trade Practices Act provisions in that area.

REGULATION, TRADE AND INDUSTRIAL POLICY

15. The Government's microeconomic reforms continue to be implemented in the ongoing process of deregulation and structural adjustment. The Trade Practices Commission plays a major role in the enforcement of competition law in deregulated industries. The Attorney General's Department is actively involved in seeking the wider application of competition policies where appropriate, in the Government's policy development concerning deregulated industries. Developments in certain deregulated industries are outlined below.

Aviation

16. As discussed in the last annual report, the Government has withdrawn from the economic regulation of domestic interstate aviation. The aviation industry is now fully exposed to the competition policy provisions of the Trade Practices Act. Since the deregulation of interstate airline services, there has been extremely vigorous competition for market share and revenues between Ansett, Australian Airlines, Eastwest and a new entrant Compass.

17. Deregulation has seen the entry of Compass Airlines into the domestic market and a signficant increase in the capacity offered by the airlines. This has occurred at a time when Australia is suffering from an economic recession which has seen a fall in demand, particularly in the high yield business sector, for domestic air travel.

18. As a result, the airlines have engaged in significant price competition to maintain their market share, with discounts of up to 70 per cent offered. While traffic stimulation has been significant, resulting in record numbers of passengers being carried, the yield per passenger has fallen, placing pressure on airline profitability.

19. Other developments in the aviation area have included the purchase by domestic airlines of a number of travel agents, preparation by the Government for the sale of Australian Airlines and the part sale of Qantas, and some rationalization of airline operations between major airlines and regional/commuter operators providing new direct services and higher frequency services on some of the thinner routes.

20. The Trade Practices Commission carries out an ongoing programme of research and investigation into the industry in order to identify, analyse and investigate potential barriers to competition. Various issues currently under examination include:

- The operation of the third-party carrier provisions of the long-term airport terminal leases in terms of the access which the leases give to new entrants and other small airlines;

- The potential to use computer reservation systems (CRS) to inhibit competition in the airline and CRS markets;

- The possibility of changes in ownership of existing domestic airlines and the potential for new entrants to be absorbed by existing airlines;

- The potential for new airlines to be subject to predatory conduct by existing airlines;

- The competition and fair trading concerns that flow from vertical integration between airlines and the retailing of airline services; and

- The activities of the Federal Airports Corporation in the granting of airport concessions.

Telecommunications

21. In the reporting period the Government made major decisions affecting the structure of the Australian telecommunications sector. Network competition is being introduced through the licensing, by end 1991, of a private sector network competitor to the publicly owned Australian and Overseas Telecommunications Corporation. Pro-competitive safeguards are being implemented, including equal access and interconnection between the carriers. The regulatory framework to give effect to this is contained in the Telecommunications Act 1991 (No. 98 of 1991).

22. The Trade Practices Commission in consultation with Austel is the body entrusted to administer competition law in the industry. Certain proposed agreements between the merged Telecom/OTC entity and the proposed second carrier are excepted from Commission examination.

23. During the year, the Commission continued an investigation into an alleged misuse of market power by Telecom in the block cabling industry after Telecom made a number of changes in its quotation practice and procedure in the industry. A number of acquisitions by Telecom and OTC were also notified to the Commission in accordance with a standing agreement.

BELGIUM

24. The Government of Belgium stated that the bill on Protection of Economic Competition was passed by the Senate on 13 July 1991 after its passage in the House of Representatives at the end of March 1991. The King of Belgium signed

the bill into law on 5 August 1991 and it was published in the Moniteur belge (Official Gazette) on 11 October 1991. The new law of 5 August 1991 on Protection of Economic Competition will come into force on 1 April 1993 in place of the law of 27 May 1960 on Prohibition of Abuse of Economic Power. However, the old law will remain in force for cases not terminated before the new law comes into force. The text of the new law, as well as the commentary provided by the Government, will be reproduced in the next issue of the Handbook on Restrictive Business Practices Legislation.

BOLIVIA

25. The Government of Bolivia informed the UNCTAD secretariat that Bolivia does not have any national RBP legislation. Nevertheless, as a member of the ANDEAN Group, Bolivia applies decisions 283, 284 and 285, which are aimed at preventing or correcting this type of practice. The texts of ANDEAN Group decisions 283, 284 and 285, relating respectively to distortions to competition resulting from dumping or subsidies, regulations to prevent or correct distortions to competition resulting from import restraints, and regulations to prevent or correct distortions to competition resulting from anti-competitive restrictive business practices, are available with the UNCTAD secretariat.

CHILE

26. The Government of Chile submitted information on its Anti-monopoly Law, Decree-Law No. 211, 1973, which is reproduced by the UNCTAD secretariat in the Handbook on Restrictive Business Practices Legislation (TD/B/RBP/49).

CYPRUS

27. The Government of Cyprus stated that it had undertaken the obligation in accordance with the terms of the Protocol for a Custom's Union Agreement with the European Communities (which entered into force on 1 January 1988), to apply the principles enunciated in articles 85 and 86 of the EEC Treaty (which concern restrictive business practices) when carrying out its responsibilities under the Agreement (arts. 27 and 28 of the Protocol).

28. In view of these circumstances, the Government had reviewed the legislative requirements. The Protection of Competition Law 1989 was enacted by the House of Representatives on 30 November 1989 and was published in the Official Gazette of the Republic of Cyprus on 8 December 1989. According to its article 43, the law was brought into force on 8 June 1990, six months after its publication.

29. The law:

(i) Prohibits agreements between enterprises if they have the intention or effect of restricting competition;

(ii) Prohibits the abuse of a dominant position in any market by an enterprise or group of enterprises;

(iii) Provides, however, for exemption of agreements, individually or by category, in circumstances where such agreements contribute to economic development of technical progress, without eliminating competition, and give consumers a fair share of the resulting benefit;

(iv) Establishes a Commission for Competition to control restrictive business practices with power to impose fines for transgressions of the law;

(v) Gives the Council of Ministers power to designate categories of agreements which may be exempted from notification to the Commission - "block exemption"; and

(vi) gives power to the public service (Ministry of Commerce and Industry) to investigate possible transgressions of the law and to maintain surveillance of the respect by enterprises of requirements imposed upon them by the Commission in regard to their business operations.

30. With a view to the practical implementation of the law, the service concerned in the Ministry of Commerce and Industry has established liaison with its counterpart services in the Commission of the European Communities, has made a first study visit to EC headquarters in Brussels, and hopes to arrange a training programme for the official who will administer the law in conjunction with the Commission for Competition.

CZECHOSLOVAKIA

31. The Government of Czechoslovakia supplied the UNCTAD secretariat with a brochure containing basic information on its Competition Protection Act adopted on 30 January 1991 and also the text of the Act.

FINLAND

32. The Government of Finland supplied the UNCTAD secretariat with the information set out below.

Changes to competition laws

33. No changes were made in competition legislation during 1991.

34. The working party for the reform of competition legislation submitted its report to the Ministry of Trade and Industry in April 1991. In October 1991 the Government presented a bill to Parliament for the new competition legislation, and the new competition acts were passed in Parliament in May 1992. The new legislation will come into force on 1 September 1992.

Background of the competition legislation reform

35. The present Finnish competition legislation, in force since 1988, functions basically well. Nonetheless it was deemed necessary to use experience acquired in the application of the present act to make legislation even more efficient and unambiguous. This was considered particularly important as during recent years competition policy had become a significant part of Finnish economic policy. Besides, with the approach of European economic integration, it was necessary to minimize the differences between Finland's competition legislation and the competition rules of the European Community and the European Economic Area.

36. The new legislation includes new prohibitions. Individual prohibited restraints on competition can be granted exemptions on certain conditions. In the new penalty system related to prohibitions, penal sanctions will be replaced by administrative penalties.

37. The Office of Free Competition and the Competition Council will retain their position as authorities applying competition legislation, although division of tasks is defined in more detail and the position of the Competition Council as a judicial organ is reinforced. The members of the Competition Council will act under judicial responsibility, and the present so-called interest representation will be abandoned. Provincial governments will remain regional authorities under the Office of Free Competition.

38. The main objective of competition legislation is unchanged. The Act on Restrictive Business Practices aims at protecting fair and effective economic competition from harmful restraints. Application of the act should take into account both consumer welfare and the importance of protecting freedom of enterprise from ungrounded restrictions.

Horizontal restrictive practices

39. The prohibition against collusive bidding included in the present Act on Restrictive Business Practices also forms part of the new act. The prohibition aims at securing in competitive bidding the efficiency of the price mechanism based on demand and supply conditions, while assuring the inviter of bids that the bid is based on the bidders' competitive opportunities.

40. Under the present act the abuse principle is applied to other horizontal restraints, but in applying the act the Office of Free Competition has generally regarded horizontal restraints as harmful.

41. The new Act on Restrictive Business Practices prohibits horizontal restrictive practices. Undertakings or associations of undertakings operating at the same production or distribution stage may not conclude agreements or other arrangements determining or recommending prices or compensation to be charged. Nor may they agree on sharing markets or sources of supply. These include the so-called indirect boycott, in which undertakings operating at the same stage group together in order to prevent an outside competitor from entering the market or to hinder the operations of a competitor already on the

market. Horizontal restrictive practices are prohibited unless essential to arrangements that render production and distribution more efficient or promote technical or economic progress, when the main benefit goes to customers or consumers.

Vertical restrictive practices

42. The prohibition against resale price maintenance included in the present Act on Restrictive Business Practices is maintained in the new act. However, in the present act the prohibition concerns only prescribing the lowest price, and this has been rectified by expanding the prohibition also to the prescribing of the highest price. Both practices can be seen as restricting freedom of enterprise and as reducing price competition. The new act also omits the mention that the prohibition against resale price maintenance does not forbid presenting a recommended price, compensation or its grounds. The mention may have led to the use of recommended prices in order to avoid violating the prohibition against resale price maintenance.

43. The abuse principle and the rule of reason approach continue to be applied to other vertical restrictive practices. The justification for this is that vertical restrictions can often be seen not only as restricting competition but also as increasing efficiency in the distribution of commodities. However, when an undertaking in dominant position uses exclusive selling or exclusive purchasing agreements it is generally considered harmful. The artificial prevention of parallel imports by an incumbent undertaking may also represent ungrounded restriction of supply.

Abuse of dominant position

44. The new Act on Restrictive Business Practices prohibits abuse of dominant position. Abuses are regarded as including the following, among others: refraining from a business relationship without good reason, using terms of sale that are not justified by good business practice and restrict the customer's freedom of action, applying an unreasonable pricing practice or one clearly aimed at restricting competition, using dominant position to restrict competition in the production or marketing of other commodities and using for no particular reason exclusive selling and exclusive purchasing agreements in the distribution of commodities.

45. The use of exclusive selling and exclusive purchasing agreements has been incorporated into the law as a new example of abuse of dominant position. The effect of exclusive selling and exclusive purchasing agreements aiming at rendering distribution more efficient and at improving the competitiveness of the commodity will not be realized in a market situation where there are no competing commodities. The arrangements hinder the operation of outside companies and prevent the entry of new manufacturers, and they can be used to maintain a high price level. A dominant company can still use a selective distribution system on condition that the company chooses the retailers on certain qualitative grounds and follows these grounds consistently.

46. The prohibition of abuse of dominant position was considered necessary because otherwise there would have been an imbalance between the attitude towards restrictive practices by small and medium-sized undertakings and restrictive practices by dominant undertakings, since the act prohibits horizontal restrictive practices by undertakings or associations of undertakings. Secondly, as Finland has applied for membership of the European Community, it was considered necessary to unify the provisions on abuse of dominant position with the competition rules of the EC.

Merger control

47. In Finland, merger control practised by competition authorities will still be based on the notification obligation of acquisitions to which a dominant company may be submitted by the Office of Free Competition. During 1988-1991 the notification obligation was imposed on 18 companies. The obligation concerns acquisitions which can be assumed to have a significant effect on competition.

48. According to the bill, the Office of Free Competition may also impose notification obligation of acquisitions on an undertaking operating on a market where competition is significantly restricted by government. In such an event the undertaking does not need to be in dominant position. The justification for this amendment is that acquisitions realized on a market where entry is prohibited by regulation can be considered especially harmful for effective competition. In these cases regulations restricting competition should naturally be abolished.

49. The new Act on Restrictive Business Practices does not include provisions on actual merger control in the sense that competition authorities could in advance prohibit the conclusion of a deal or interfere with a concluded deal. Mergers can aim at and lead to less competition, but on the other hand they belong to the normal course of the economy and should not be interfered with except under special circumstances. In particular, competition authorities should control mergers that occur in fields regulated by government or create a dominant position or strengthen it. In both cases the buying company acts in a situation where the acquisition may have harmful effects on effective competition.

50. Especially in a small economy like Finland's, concentration is an essential part of boosting the operations of companies operating on international markets. Abolition of berriers to entry and securing freedom of potential competition is then a foremost way of assuring effective competition on domestic markets, as opposed to interference with concentration. It has been estimated that merger control would bring about a degree of administrative bureaucracy whose costs would exceed the benefits it would have.

Deregulation

51. Extensive regulation in Finland prevents the entry of domestic as well as foreign competitors and the operations of incumbent companies are regulated in many ways. Restraints on competition set by regulations are permanent and

thus particularly harmful. Assessing unnecessary regulation restricting competition and working to abolish it has in practice become a central duty of the Office of Free Competition.

52. Already according to the present act, assessing regulation and making proposals to abolish or modify it can be considered the responsibility of the Office of Free Competition. None the less, to highlight the central duty of the Office, the act has been supplemented with a special provision stating that the Office of Free Competition is also responsible for making proposals aimed at the abolition of restrictive regulations and rules. This duty of the Office of Free Competition also concerns administrative procedures observed when applying regulations and rules.

Violations of prohibitions, sanctions and exemptions

53. The present Act on Restrictive Business Practices states that violation of a prohibition is punished by a fine or a maximum sentence of one year of imprisonment. So far the few restrictive practice offences that have been heard in court have led only to low fines, which cannot be expected to have a general preventive function. In matters of restrictive business practice, penal sanctions cannot be regarded as effective penalties. Furthermore, without expert knowledge it is difficult to evaluate the economic facts related to restrictive practices; therefore restrictive practice offences can best be dealt with by authorities specialized in handling competition matters.

54. Hence, the sanction system has been reformed. Violations of prohibitions will be punished by a special administrative fine (competition violation fine). The fines are set by the Competition Council on the recommendation of the Office of Free Competition. The decision of the Competition Council can be appealed to the Supreme Administrative Court.

55. The nature, scope and duration of the restrictive practice is taken into account when setting the amount of the competition violation fine. The minimum amount is Fmk 5,000 and the maximum amount Fmk 4 million. In the case of particularly harmful restrictions, the fine can be higher, at the most 10 per cent of the net sales for the previous year of each undertaking participating in the restrictive practice or of the association of undertakings. The intention is that the fine should exceed the benefit gained by the restrictive practice.

56. On application the Office of Free Competition can grant individual exemptions to the prohibitions. An exemption can be granted only if the undertakings are able to prove that the arrangement renders production or distribution more efficient or promotes technical or economic progress, with the main benefit going to the customers or consumers. Such permitted arrangements might include for example horizontal rationalization or specialization agreements and agreements on cooperative research and development. If the Office of Free Competition deems that there is no justification for granting an exemption, the applicant can demand that the matter be presented for decision to the Competition Council.

The abuse principle and negotiation procedure

57. The abuse principle will still be applied to restrictive practices other than those specifically prohibited, and the characteristics of harmful effects will be defined as in the present act. A restrictive practice is considered to have harmful effects if, in a way contrary to fair and effective economic competition, it affects price formation, lessens efficiency, prevents or hinders another person's business activity or is incompatible with a binding international agreement.

58. The Office of Free Competition (and the provincial governments) investigates restrictive practices and their effects and initiates negotiations with the parties in order to remove the harmful effects. If the Office of Free Competition (or a provincial government authorized by the Office) is unable to remove the harmful effects through negotiations or other means, it must refer the matter to the Competition Council.

59. According to the Government bill the negotiations aiming at removing the harmful effects of restrictive practices are to be conducted at the Office of Free Competition, and the Competition Council would no longer negotiate again with the parties but would make a direct decision in the matter. The reform was necessary in order to speed up and make more efficient the processing of cases.

60. The sanctions available to the Competition Council in abuse principle matters will be the same as in the present act. The Council may forbid a restrictive practice, oblige the delivery of a commodity or determine for at the most six months at the time the lowest or highest price used by an undertaking in dominant position. The Competition Council may emphasize its decisions by conditional imposition of a fine. The decisions of the Competition Council can be appealed to the Supreme Administrative Court.

61. As opposed to the present situation, the Office of Free Competition may if necessary temporarily forbid the application of a restrictive practice, under penalty of a fine. Such a stipulation must be submitted to the Competition Council within a week after it has been passed, under penalty of expiration of the stipulation.

Notification and registration of restrictive practices and the powers of competition authorities to obtain information and to investigate

62. Competition authorities are given greater powers to obtain information. The duty to provide information according to the present act only concerns the undertakings or the association of undertakings involved in the restrictive practice. As the existence of a restriction cannot necessarily be shown during investigations, companies have been able to contest the powers of the authorities to obtain information by denying their part in the restriction. In the new act the duty to provide information does not depend on whether the undertaking is involved in the restrictive practice. This means that the duty to provide information also applies for example to the customers and competitors of the company suspected of using a restrictive practice. Information must also be provided for studies on competition conditions. The duty to provide information can be emphasized by conditional imposition of a fine.

63. The investigation powers of the competition authorities will mainly remain the same. An investigation may be conducted to investigate a prohibited restrictive practice or to control whether the Competition Council's decisions are followed. These powers also concern the use of exemptions from prohibited restrictive practices. The duty to provide information in investigations can be emphasized by conditional imposition of a fine, which replaces the possibility to use in investigations the executive assistance of the police, as provided in the present act.

64. The duty of undertakings to notify restrictive practices to the Office of Free Competition has been removed. It is the experience of the Office of Free Competition that important restrictive practices are usually not notified to the Office; rather, such restrictive practices are usually discovered on the basis of a tip-off to competition authorities by an outsider or collection of information by authorities. Furthermore, registration of restrictive business practices has been removed.

65. The Office of Free Competition had, in 1991, an exchange of information with several foreign competition authorities, especially from other Nordic countries and East European countries, concerning competition legislation and competition policy issues. There were various multilateral contacts between the competition authorities of the Nordic countries. The Office of Free Competition also received notifications of restrictive business practices cases where Finnish undertakings were involved.

66. On the initiative of the Office of Free Competition, the competition authorities of Denmark, Iceland, Norway, Sweden and Finland organized a seminar on competition policy together with the authorities of Estonia, Latvia and Lithuania. The seminar was held in Estonia in November 1991.

GERMANY

67. The Government of Germany submitted its Annual Report on Competition Policy, Privatization and Deregulation, New Restrictive Business Practices Legislation and Control of Restrictive Business Practices. The report contains inter alia, the information reproduced below.

New restrictive business practices legislation

68. Neither the German Act Against Restraints of Competition (ARC) nor the Unfair Competition Act (UCA) was amended in the period under report. At present, there are no revision plans.

Control of restrictive business practices

69. As mentioned in paragraph 16 of our report for 1990, the Federal Cartel Office (FCO) imposed fines totalling more than DM 40 million (US$ 25 million) on leading German drug wholesalers and their responsible managers for participating in restrictive horizontal agreements. FCO found that from 1987 to 1990 the enterprises concerned agreed on uniform rebate cuts and thereby increased the pharmacies' purchasing prices by uniform amounts. During this period, they also granted each other protection of patronage and suspended competition for new customers.

70. In another proceeding, the FCO fined four leading German tour operators and five large domestic charter airlines a total of DM 6.3 million (US$ 4 million) for having agreed uniform fuel surcharges.

71. In response to rising fuel prices the firms decided in September 1990 that from 18 January 1991 they would charge uniform distance-related surcharges on all air tours. As a result of this joint action the different effects of increases in costs of the charter airlines are not taken into account by tour operators in setting their prices. Mark-ups based on higher fuel costs have to be determined individually by each of the competing firms. In the absence of such a cartel agreement consumers could have benefited from price competition among the tour operators.

72. Under German competition law such practices are considered hard-core violations that are per se prohibited. The FCO will continue to impose heavy fines for such violations, especially in case of industry-wide cartels. In doing so, the Federal Republic of Germany honours its commitment to the Set of Principles and Rules in its major part.

73. The decisions imposing fines on the drug wholesalers have become unappealable and the fines have since been paid. Another major proceeding for price agreements in the German glass wholesale trade is still pending.

74. Over the years, abuse supervision of market-dominating forms has lost some of its formerly crucial importance. National barriers to trade in goods and services disappear as the European single market approaches. This explains why abuses of market power are now found only in those sectors in which markets are still national or regional, for example the German energy sector.

75. In the period under report, the FCO conducted proceedings against a regional electricity supplier and a gas producer for abusive pricing. No decisions to stop the abusive practices were rendered in the end, though, because the firms discontinued the practices in question after receiving the FCO's statement of objections. Even such proceedings are less likely to be conducted in future though, because many energy markets will no longer be national or regional markets as a result of "wheeling" contracts and international links.

76. Besides having to enforce the cartel ban and to practice abuse supervision, the FCO's main task is to prevent mergers resulting in or strengthening market domination. While only one merger project was prohibited in 1991 (as against 5 in 1988, 11 in 1989, and 7 in 1990), the safeguarding of competitive market structures continues to be the main activity of the 230 FCO collaborators.

77. The above-mentioned single prohibition concerned the proposed merger between Baywa AG and WLZ AG. Baywa and WLZ are both powerful organizations of agricultural cooperatives in Germany which handle their members' entire purchasing and sales. In the FCO's view, the merger, would strengthen the already strong regional market positions of the two cooperatives at the expense of their medium-sized competitors. The prohibition decision has not yet become unappealable, though.

78. In addition to the formally prohibited merger, a number of merger projects were abandoned by the parties after the FCO had raised objections to the projects on competition grounds and informed the parties of its intention to prohibit it.

79. While a number of cross-border mergers was beyond national control by virtue of the EC merger control regulation, the FCO, as in previous reporting periods, examined several mergers in which foreign firms participated either directly or indirectly through German-based subsidiaries. In two cases the FCO informed the notifying firms that the projects would raise competitive concerns, with the result that the firms withdrew their notifications.

80. The FCO will continue its practice of proceeding against all restraints of competition in the Federal Republic of Germany, even if they result from acts done outside its territory.

Other activities

81. The Federal Republic of Germany has always made efforts also to meet the international commitments mentioned in F 6 of the Set of Principles and Rules.

82. The Federal Republic of Germany continued its series of competition law seminars for advanced experts from national competition authorities which were organized in cooperation with UNCTAD and with a representative of the UNCTAD secretariat participating. In autumn 1991 a seminar for competition experts from Thailand and Sri Lanka was held in Bangkok. Further seminars are scheduled for 1992 and thereafter.

83. As another measure in the technical assistance field that is consistent with the Set of Principles and Rules, both the Federal Ministry of Economics and the FCO received many foreign delegations, a number of government officials and competition experts from developing countries, from countries of the former eastern bloc and also from industrial countries who attended training programmes. The stays at the FCO of six weeks and one week respectively by two senior officials from the People's Republic of China and a one-month stay by a senior official from the Russian Federation deserve special mention. Such training programmes at the FCO will also take place in 1992 and the following years.

GREECE

84. The Government of Greece submitted its annual report summarizing the developments in Greek competition policy between June 1989 and September 1991.

85. During the period covered by this report, the Greek Competition Act 703/77 on the "Control of Monopolies and Oligopolies and on the Protection of free Competition" was amended by Act 1934 which was enacted by the Greek Parliament in March 1991.

86. The main amendments provide the following:

(a) A definition of when a concentration is deemed to arise and when not (art. 4, paras. 2 and 3);

(b) The obligatory notification within one month from their realization of those concentrations where:

(i) The market share of the undertakings concerned exceeds 10 per cent either in the national market or in a substantial part of it; or

(ii) The aggregate turnover of all the undertakings concerned exceeds within the national market the equivalent in Greek drachmas of 10 million ECU.

In the case of culpable omission of the obligation to notify, the imposition of a fine up to 3 per cent of the aggregate turnover is provided (art. 4a);

(c) The exercise of preventive control under the following presuppositions. When it is deemed that the increase in the degree of concentration - as this is derived by the notifications or regardless of them by the investigations of the competent Authority - can lead to an impediment, restriction or distortion of competition in certain sectors of the economy, concentrations pertaining to these sectors will be subject to preventive control by a joint decision of the Ministers of Commerce and National Economy. Undertakings belonging to sectors subject to preventive control which already possess before the realization of the concentration or will acquire through it a certain magnitude expressed either as market share or as aggregate turnover are obliged to notify in advance, i.e. where:

(i) The market share of all undertakings which are parties to the merger exceeds 35 per cent either in the national market of homogeneous goods or services, or in a substantial part of it; or

(ii) the aggregate turnover of all the undertakings concerned reaches or exceeds the equivalent in Greek drachmas of 75 million ECU (art. 4b);

Through this joint decision the Minister of Commerce has the power to take all the necessary measures either prohibiting the concentration (art. 4b, para. 3), or imposing conditions that would ensure free competition (art. 4c, para. 1);

Generally a concentration of undertakings pertaining to sectors of the economy which have been subjected to preventive control is prohibited, if it can lead to an impediment, restriction or distortion of competition, more especially by the creation or strengthening of a dominant position. In making this appraisal, a number of factors as provided in article 4b, paragraph 3, have to be taken into account;

(d) The procedure for those concentrations subject to preventive control: the Minister of Commerce, after obtaining the opinion of the Competition Committee - which as far as concentrations are concerned has an advisory role - issues within two (2) months from the date of notification a decision by which he can:

- Either prohibit its realization;

- Allow its realization exceptionally; or

- Declare that the concentration does not fall within the scope of the present Act (art. 4c);

(e) The imposition of a fine of up to 15 per cent of the aggregate turnover of the undertaking involved, in the case of a concentration being realized before the issuance of the relevant ministerial decision. In addition to that, the Minister of Commerce is empowered - after obtaining the opinion of the Competition Committee - to order either the separation of the undertaking, or of the assets brought together as a result of the concentration, or any other appropriate action to restore competition (art. 4d);

(f) The Competition Committee according to the amendments passed in 1982 had only the responsibility of giving opinions on the cases brought before it. The decisive role had been passed to the Minister of Commerce. Now the decisive competence is being given again to the Competition Committee, except in the case of concentrations. In addition, matters related to the functioning of the Competition Committee are being determined (art. 8);

(g) The introduction of a shorter period of time for the decisions of the Competition Committee and the Minister of Commerce to be challenged on appeal to the Athens Administrative Court of Appeals, i.e. 20 days after their notification (art. 14);

(h) The introduction of Ministerial decisions issued after the concurrent opinion of the Competition Committee, granting exemptions to certain categories of agreements in accordance with article 1, paragraph 3 of the Act. In addition to that, certain categories of agreements, decisions and concerted practices may be determined by Ministerial decisions as not falling under the provisions of article 1, paragraph 1. Through mainly the first mentioned decisions, the Directorate will be able to concentrate its efforts on the most significant cases of uncompetitive behaviour (art. 8a);

(i) The application of the existing provisions related to the conduct of investigations by the authorized employees of the Directorate also to cases of merger control. Additionally, in case of an investigation being refused or impeded, a request for the assistance of Police authorities can be made through the competent Public Prosecutor (art. 26).

INDIA

87. The Government of India stated that the provisions of the Monopolies and Restrictive Trade Practices Act, 1969, encompass many of the principles and rules contained in the Set of Principles and Rules. Monopolistic trade practices, restrictive trade practices and unfair trade practices have been defined in sections (i), 2 (o), 33 (1) and 36A respectively of the Act. The information regarding these trade practices have already been supplied to the UNCTAD secretariat from time to time. The Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, has been amended from time to time and information regarding these amendments has also been sent to the UNCTAD secretariat. The major amendments in the MRTP Act were made during 1984 when section 36A on unfair trade practices was inserted.

88. According to the Gazette of India, Extraordinary Part-II, Section 3, subsection (i), dated 27 September 1991, the MRTP Act shall apply to the undertakings specified in clauses (a), (b), (c), (e) and (f) and financial institutions under clause (g) thereof, except the undertakings owned or controlled by a government company or the Government, as the case may be, engaged in the production of arms and ammunition and allied items of defence equipment, defence aircraft and warships, atomic energy, minerals specified in the schedule to the Atomic Energy (control of production and use) Order, 1953, and industrial units under the Currency and Coinage Division of the Ministry of Finance, Department of Economic Affairs.

89. Thereafter the major changes were made during 1991 and details of these amendments are given below:

(1) Short title and commencement: (i) This Act may be called the Monopolies and Restrictive Trade Practices Amendment Act, 1991;

Amendment of Section 12A: in Section 12A of the Principal Act, after subsection (2), the following explanation shall be inserted, namely:

"(I) For the purposes of this section, an enquiry shall be deemed to have commenced upon the receipt by the Commission of any complaint, reference or, as the case may be, application on its own knowledge or information reduced to writing by the Commission.

(II) For the removal of doubts, it is hereby declared that the power of the Commission with respect to temporary injunction includes power to grant a temporary injunction without giving notice to the opposite party."

Insert of new Section 13B: After Section 13A of the Principal Act, the following section shall be inserted, namely 13B:

"The Commission shall have and exercise the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of Contempt of Court Act 1971 shall have effect subject to the modification that:

(a) The reference therein to a High Court shall be construed as including a reference to the Commission;

(b) The reference to the Advocate General in Section 15 of the said Act shall be construed as a reference to such Law Officer as the Central Government, may, by notification in the official Gazette, specify in this behalf."

Amendment of Chapter III: In Chapter III of the Principal Act:

(a) Part A shall be omitted;

(b) The word and letter "part B", occurring before Section 27 shall be omitted.

Amendment of Section 27: Section 27 of the Principal Act has been suitably substituted.

Amendment of Section 27A: Section 27A of the Principal Act has also been substituted by a suitable amendment.

Omission of Part C: Part C of Chapter III of the Principal Act shall be omitted. Chapter III-A of the Principal Act shall be omitted.

Amendment of Section 31

After the words "Commission receives", the words "any application from the DG or" and after the words "it may", the words "on such application or" shall respectively be inserted.

Amendment of Section 36A:

(a) For the portion beginning with the words "adopts one or more" and ending with the words "or otherwise", the following shall be substituted - "adopts any unfair method or unfair or deceptive practice, including any of the following practices";

(b) In clause (i) in subsection (i) after the word "quality", the word "quantity" shall be inserted.

Substitution of new Section for Section 36C: For Section 36C of the Principal Act, the new Section has been substituted.

Amendment of Section 36D: In Section 36D of the Principal Act, in subsection (1) -

(a) In clause (a), the word "and" occurring at the end shall be omitted;

(b) After clause (b), the following clause shall be inserted, namely:

"(c) any information, statement or advertisement relating to such unfair trade practice shall be disclosed, issued or published, as the case may be, in such manner as may be specified in the order".

Omission of Section 45: Section 45 of the Principal Act shall be omitted.

Amendment of Section 46: In Section 46 of the Principal Act, the words and figures "Section 22 or Section 23 or Section 24 or" shall be omitted.

Omission of Section 47: Section 47 of the Principal Act, subsection (2) shall be omitted.

Amendment of Section 48: In Section 48 of the Principal Act, subsection (2) shall be omitted.

Substitution of new section for Section 48B: For Section 48B of the Principal Act, the new Section shall be substituted.

Penalty for contravention of Section 27B: Penalty for acquisition or transfer of shares in contravention of Section 27B has been substituted by a new clause.

Amendment of Section 48C: In Section 48C of the Principal Act, for the words "which may extend to 3 years, or with fine which may extend to Rs.10,000/- or with both", the following shall be substituted, namely: "which shall not be less than six months but which may extend to 3 years and with fine which may extend to Rs.10 lakh; provided that court may, for reasons to be recorded in writing, impose a sentence of imprisonment for a term lesser than the minimum term specified in this Section".

Amendment of Section 50: In Section 50 of the Principal Act, for subsection (1) and (2), the Section shall be substituted by a new section enhancing the imprisonment from one year to three years and punishment from Rs.5,000 to Rs.50,000/- and where the offence is the continuous one, with a further fine which has been extended from Rs.500 to Rs.5,000/- for every day.

Amendment of Section 54: In Section 54 of the Principal Act:

(a) Subsection (2) shall be omitted;

(b) In Subsection (3), the words, brackets and figures "or any term of a scheme of finance, as modified in subsection (2)" shall be omitted.

Amendment of Section 55: In Section 55 of the Principal Act, after the words "the Commission under", the words, figures and letter "Section 12A or" shall be inserted.

Amendment of Section 67: In Section 67 of the Principal Act, in subsection (2), clauses (aa) (ba) and (g) shall be omitted.

Omission of schedule: The schedule to the Principal Act shall be omitted.

JAPAN

90. The Government of Japan submitted its annual report which summarizes developments in its competition policy for 1991 and some developments from January to March 1992. The summary contains, inter alia, the information reproduced below.

CHANGES IN COMPETITION LAWS AND POLICIES ADOPTED OR ENVISAGED

1. Summary of new provisions in competition laws and related legislation

91. The implementation of Japan's antimonopoly policy is based upon the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Act No. 54 of 1947), hereinafter referred to as "the Antimonopoly Act", along with two other supplementary acts: the Act Against Delay in Payment of Subcontract Proceeds, etc., to Subcontractors (Act No. 120 of 1956), hereinafter referred to as "the Subcontract Act", and the Act Against Unjustifiable Premiums and Misleading Representations (Act No. 134 of 1962), hereinafter referred to as "the Premiums and Representations Act".

92. During the period subject to this report, the Act to amend the Antimonopoly Act was promulgated in April 1991 and took effect in July of the same year. This amendment is designed to drastically increase surcharges to be imposed on firms engaged in cartels to strengthen the deterrence against violations. With this amendment, the rate by which the sales amount is multiplied for the calculation of the amount of surcharges, in principle, has been quadrupled from 1.5 per cent of sales to 6 per cent.

93. In order to further enhance the overall deterrence against antimonopoly violations, the Bill to amend the Antimonopoly Act was submitted to the Diet in March 1992. The proposed amendment aims to raise the upper limit of criminal fines against firms or trade associations for offences of private monopolization, unreasonable restraint of trade, etc., from the current 5 million yen to 100 million yen.

2. Strengthening Deterrence and Executing Power and other related measures

(1) Rigorous actions against violations of the Antimonopoly Act and measures to enhance deterrence against them

94. In order to promote free and fair competition, rigorous enforcement of the Antimonopoly Act is the fundamental requirement. To meet this requirement, the Fair Trade Commission has taken rigorous measures against conduct violating the Antimonopoly Act, such as price-fixing cartels, bid-rigging, resale price maintenance and unreasonable obstruction of imports, and at the same time has been active in investigating violations in the fields of distribution and services, and in government-regulated industries.

95. In order to strengthen the deterrence against violations of the Antimonopoly Act and to enhance the executing power of the Commission in its investigation of cases, the Commission took the following measures in 1991.

(a) Expanding and enhancing the investigating functions of the Fair Trade Commission

96. As measures to strengthen the detecting and investigating functions relating to violations of the Antimonopoly Act, the staff of the investigation department was increased by 24 persons and two more units were added to the investigation department of the headquarters and local offices.

(b) Publication of formal actions and warnings

97. Regarding formal actions such as recommendations and surcharge payment orders, the Commission has traditionally announced contents of the actions, including names of offenders, nature of violations and circumstances surrounding them, with a view to further enhancing the deterrent effect, preventing similar violations and ensuring the transparency of the actions taken. Even during the reporting period, all formal actions have been announced. All cases of warning other than in exceptional ones have also been made public.

(2) Competition policy measures on distribution systems and business practices

98. For strict and effective enforcement of the Antimonopoly Act, it is indispensable that, by ensuring the transparency of law enforcement, the purpose of the Act, the contents of regulations and enforcement policy be fully understood by firms and consumers in Japan and abroad. From this point of view, the Fair Trade Commission has conducted various surveys and published some guidelines under the Antimonopoly Act, in addition to strict enforcement of the Act. In 1991, the Commission formulated and published "the Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices".

THE ANTIMONOPOLY ACT GUIDELINES CONCERNING DISTRIBUTION SYSTEMS AND BUSINESS PRACTICES

99. On the basis of a proposal set forth in June 1990 by the Advisory Group on Distribution Systems, Business Practices and Competition Policy, the Fair Trade Commission decided to formulate guidelines specifically describing the Commission's interpretation and enforcement policy of the Antimonopoly Act concerning distribution systems and business practices. The Fair Trade Commission published draft Guidelines and solicited comments on the draft on a wide scale from relevant agencies and organizations, both at home and abroad.

100. A large number of comments on the draft were received from relevant agencies and organizations, both at home and abroad. The Fair Trade Commission, after carefully examining and taking full account of these comments, modified the draft Guidelines from the viewpoint of clearly indicating non-discriminatory treatment between domestic and foreign firms or products and making the Guidelines more comprehensible by including additional examples, and finalized and published "The Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices" in July 1991.

101. The Guidelines provide specific guidance on major types of conduct that would create problems concerning distribution systems and business practices under the Antimonopoly Act. The Guidelines consist of three parts: Part I - "The Antimonopoly Act Guidelines Concerning the Continuity and Exclusiveness of Business Practices Among Firms"; Part II - "The Antimonopoly Act Guidelines Concerning Transactions in Distribution"; and Part III - "The Antimonopoly Act Guidelines Concerning Sole Distributorship".

Part I: keeping in mind producer-user transactions relating to producer goods and capital goods, describes the Commission's enforcement policy of the Antimonopoly Act primarily on business practices effected to create or enhance continuous transaction relationships or conducted on the strength of such relationships, which may result in hindrance of new entries of firms into a market or exclusion of existing ones from the market, chiefly from the viewpoint of regulations of unreasonable restraints of trade and unfair trade practices.

Part II: keeping in mind manufacturer-distributor transactions relating to consumer goods, describes the Commission's enforcement policy of the Antimonopoly Act on restrictions which manufacturers may impose on their distributors and on abuse of retailers' dominant bargaining position vis-à-vis their suppliers, from the viewpoint of regulation of unfair trade practices.

Part III: describes the Commission's enforcement policy of the Antimonopoly Act on sole distributorship, regardless of types of goods.

102. There may be cases where it is difficult for businesses to determine whether or not particular practices present a problem under the Antimonopoly Act in the light of the Guidelines. The Commission, therefore, established a prior consultation system concerning distribution systems and business practices on this occasion.

103. Since these Guidelines were made public, firms have been increasingly formulating internal Antimonopoly compliance programmes, making reference to the Guidelines. The Fair Trade Commission has been supporting such voluntary efforts by these firms in formulating compliance programmes.

EXEMPTION CARTELS

104. The Antimonopoly Act, in principle, prohibits cartels by entrepreneurs and trade associations. However, some exceptions are recognized for cartels which meet specified conditions provided in laws. Special provisions for such exemptive treatment are set forth not only in the Antimonopoly Act itself, but also separately, in specific laws such as the Small and Medium Sized Enterprises Organization Act and the Export and Import Trading Act. As a rule, the formation of exemption cartels requires notification with, or authorization by, the Fair Trade Commission or the competent agencies.

105. As of the end of 1991, the number of exemption cartels in the formation of which the Fair Trade Commission was involved was 224. Most of these existing exemption cartels are those formed by small- and medium-sized enterprises, as well as those whose objectives are to avoid trade frictions.

MERGERS AND ECONOMIC CONCENTRATION

Statistics on mergers

106. Under Sections 15 and 16 of the Antimonopoly Act, prior notification of all mergers and transfers of business must be filed with the Fair Trade Commission. During 1991, the Commission received 2,116 merger notifications under Section 15, and 1,214 transfers of business notifications under Section 16. During that period, there were no cases of merger or transfers of business in which the Commission took formal measures (see the table below).

107. In Japan, when a proposed merger may raise concern under the Antimonopoly Act, it is usual for parties concerned to consult with the Fair Trade Commission before filing the merger notification, and the Commission examines it rigorously to see whether it violates the Antimonopoly Act. If the proposed merger does, in fact, present competitive concern at the consultation stage, the proposed merger is abandoned or carried out after modifying its contents so that it would present no problem under the Act.

Table: Number of notifications filed on mergers and transfers of business

Year	1989	1990	1991
Mergers	1 432	1 532	2 116
Transfers of business	1 050	969	1 214
TOTAL	2 482	2 501	3 330

THE ROLE OF COMPETITION AUTHORITIES IN FORMULATION AND IMPLEMENTATION OF OTHER POLICIES

Relaxation of government regulations and review of exemption systems

108. The Fair Trade Commission, from the standpoint of competition policy, has been reviewing government regulatory systems, etc., based on mid- to long-term periods. In accordance with the Recommendation by the OECD Council in 1979, the Fair Trade Commission conducted research on the actual conditions thereof, and in 1982 announced its views on government regulations and since then has requested relevant ministries and agencies to study relaxation of regulations.

109. Further, the Provisional Council for the Promotion of Administrative Reform recommended, in its final report (of 18 April 1990), the abolition or relaxation of public regulations and the utilization of private sectors as one of the main issues of administrative reform and of the basic directions of the reform. In response to this recommendation, the Government decided at the Cabinet meeting (on 27 April 1990) that "administrative and fiscal reforms both at the national and local levels will be continuously promoted while

respecting the final report of the Provisional Council for the Promotion of Administrative Reform to the maximum possible extent, and reform measures will be coordinated and drafted, and successively put into action".

110. In 1991, the Fair Trade Commission, with a view to reducing the exemption systems of the Antimonopoly Act to a necessary minimum, held the Study Group on Government Regulations, etc., and Competition Policy to examine the problems involved and desirable exemption systems and their administration. A report on the result of these studies was announced in July 1991. Concerning the review of the resale price maintenance system, the Fair Trade Commission, in accordance with the report, undertook surveys on the actual conditions. In December 1991, the results of its findings were announced and public hearings were held to listen to opinions from a wide range of parties concerned.

NEW STUDIES RELEVANT TO COMPETITION POLICY

Research findings on the actual conditions of transactions between firms

111. Interest has recently been growing, both in and out of Japan, in trade practices between companies in Japan, and in particular in appraisal of the practices of continuous transactions. The actual conditions of such transactions between firms and the background thereof, etc., are considered to vary depending on each sector of industry. Consequently, the Fair Trade Commission conducted surveys on the actual conditions of transactions between firms in specific industries.

112. For this research, four industries were selected: the household electric appliances manufacturing industry, the shipbuilding industry, the synthetic fibre manufacturing industry and the city gas service industry. For each of the four industries, research was conducted on the actual conditions of transactions of raw materials, parts, etc., necessary for production. Its findings were published in June 1991. (An outline of this report is found in the Fair Trade Commission's Japan Views, No. 12.)

Report on the Actual Conditions of the Six Major Corporate Groups

113. In Japan, there are various corporate groups. However, six of them outstrip the others in scale, influence, etc. The Mitsui, Mitsubishi, Sumitomo, Fuyo, Sanwa and Dai-Ichi Kangyo groups are called the six major corporate groups.

114. The Fair Trade Commission conducted research, from the standpoint of competition policy, on how the member firms of each group are interlinked and what transactions are conducted within each major corporate group. Its findings were announced in February 1992.

MAURITIUS

115. The Government of Mauritius stated that there was no specific statute dealing with restrictive business practices in the Republic of Mauritius and the only control on business is:

(i) Licensing meant for revenue purposes;

(ii) Prohibition to safeguard morality, safety and public order.

NORWAY

116. The Government of Norway transmitted its report to UNCTAD covering the period 1 May 1991 to 30 April 1992.

New RBP legislation

117. In October 1991, a committee appointed to propose a new competition act submitted its report entitled "Competition for Economic Efficiency" to the Ministry of Labour and government authorities. A translation of the proposed bill and a summary of the recommendations contained in the report were made available to the UNCTAD secretariat.

118. It was further stated by the Government that the bill will come before Parliament in the autumn of 1992 at the earliest.

Enforcement of competition law and policies

119. Extracts of the report to UNCTAD are given below.

1. Administrative sanctions

A. Loyalty rebates

120. In 1991 the Price Directorate examined various systems of rewarding loyalty by granting substantial discounts to retailers who meet certain requirements. In the opinion of the Price Directorate, loyalty discounts offered by dominant enterprises may induce a serious restraint of trade. When a dominant enterprise uses such a system, the result may well be that entry to the market becomes impossible and that even established firms may find it hard to stay in business. This may also be the case when a number of enterprises which together dominate a market introduce such systems. In general the dynamics in the market will suffer when loyalty discounts are introduced by a significant number of firms.

121. After a few interventions against such systems introduced by dominant enterprises, the view taken by the Price Directorate on loyalty discounts became well known. Subsequently, in some cases, the mere fact that an intervention was under consideration made the firm in question withdraw its system of loyalty discounts.

B. The liberal professions

122. In the last few years the Price Directorate has examined the by-laws and ethical standards of a number of liberal professions, among them the Norwegian Architects' League, the Norwegian Federation of Interior Designers, the Norwegian Federation of Landscaping Architects, the Norwegian Federation of Designers for Industry and the Norwegian Federation of Graphic Designers.

Veterinary services

123. In 1991 the Price Directorate looked into the ethical rules of the Norwegian Veterinary Association.

124. The charter of the association prohibits a "no cure no pay" agreement with a client. Furthermore only in cases of severe financial hardship could a client be offered a reduced fee or asked no fee at all. The Price Directorate found these provisions to be in conflict with the prohibitions against price agreements.

125. The charter also contained a demand for acting loyally towards the association and its members, and banned disloyal competitive activities. The Price Directorate argued that this limited the information allowed in advertising, hindered the establishment of new veterinary surgeries and restricted competition in general. The Price Directorate took the view that decisions on whether a certain conduct is loyal, disloyal or unseemly should not be decided by associations of certain interests or trades. A number of other provisions were also found to be detrimental to competition by restricting entry to the market of new veterinary surgeries. The Price Directorate has been informed by the association that the ethical rules will be revised in the course of 1992 in accordance with international standards, and all provisions concerning competition and pricing will be removed. Intervention has therefore been postponed until the revisions have been made.

Psychological services

126. After having studied the implications of the ethical rules of the Norwegian Psychological Association, the Price Directorate intervened against some of the provisions. As the Association organizes a major part of the Norwegian psychologists, any harmful effects on competition resulting from the ethical rules will affect the total Norwegian market for psychological services; that is, not only therapeutic services but also all other activities carried out by psychologists, for instance commissions concerning organization development, enterprise counselling, etc.

127. The Price Directorate came to the conclusion that some of the provisions might have detrimental effects, especially those dealing with restrictions on how members could market their services. The rules prohibited advertisements having an element of personal promotion or giving the impression of quick and superior results. The restrictions were found harmful because they hindered the clients' rational choice of treatment. They also affected entry to the profession by restricting how newly licensed psychologists could inform possible clients of their services.

128. The Price Directorate also intervened against provisions prohibiting psychologists from accepting a new client unless contact had been taken with the psychologist who had previously treated the client. The Price Directorate found that the provision severely restricted the freedom a client should have in choosing a psychologist.

C. Exemption practice

129. The Price Directorate has the authority to grant exemption for the prohibitions in the 1957 provisions against resale price maintenance and the 1960 provisions against cooperation concerning prices, profit margins or rebates.

Trade comprehensive cooperation

130. In general the Price Directorate is reluctant to exempt any cooperation concerning prices, mark-up, discounts etc. which includes a large section of a branch of trade in a particular market. Such cooperation will almost always have detrimental effects on competition in the trade whether the cooperation is nation-wide or local. The fact that cooperation will lead to reduced prices in a specific sales campaign may not be a sufficient reason for granting an exemption. Any cooperation encompassing most members of a trade may well impede the will to compete within the trade in question.

131. A few years ago the Price Directorate made an analysis of some advanced calculation aids used in the construction and building industry. Collaboration in this field is cost-effective and has been presumed to have only small negative influence on competition. In general such collaboration is granted an exemption, usually on certain conditions. It should for instance not include elements of price and costs which will vary between the firms which may make use of the calculation aids.

Cooperation with regard to tenders

132. Joint cooperation between enterprises concerning specific building or construction projects has been exempted in general from the prohibitions regarding cooperation with regard to tenders. Individual exemptions will in general not be granted. Collusive tendering may have an extremely harmful effect on competition, and the Price Directorate is consequently very restrictive in granting exemptions.

Bilateral price agreements

133. When two or more suppliers of goods or services enter into agreement on prices with one or several purchasers, the cooperation between the sellers will be in conflict with the 1960 provisions. When deciding whether or not to grant an exemption, the influence of the agreement on the total competition in the particular trade will carry considerable weight. If the agreement may have as a result less competition in fields outside the agreement, for instance when the prices agreed upon will be normative for a wider sector, the Price Directorate will as a rule not grant an exemption.

134. If the buyers in a particular market have a strong position, cooperation between sellers may make the sides more equal when transactions are made. Such considerations may be taken into account for decisions on whether or not exemptions should be granted.

Chains and cooperating groups

135. Collaboration within chains may under certain circumstances be beneficial. Competition between chains may be a rational form of competition. Cooperation may lead to rationalizations as well as cost reductions for the participating firms, for instance by transferring certain functions from each firm to the central organization. Competition in the market may channel such gains to lower prices for the consumers. To permit chains to collaborate may also lead to more competition in a market by placing the participating firms in a better position to compete, for instance with companies and with branches.

136. Small groups of retailers and service firms will in most cases be granted exemptions. Whether or not to grant exemptions for other groups will be decided after a thorough analysis. This applies to any group with a market share of 15 per cent or more, and any group of wholesalers or suppliers in general.

Resale price maintenance

137. Except for those granted to chains of enterprises, exemptions from the prohibitions in the 1957 provisions are seldom granted. Permission for individual suppliers to omit the notification that the resale prices are only recommended prices or allowing binding resale prices is given only in special circumstances and only if the exemption is believed to have positive effects in the greater view. Normally exemptions will only be granted to individual firms.

D. Merger cases

Nora Industrier and Orkla Borregaard

138. During the period covered by this report the Price Directorate looked into the merger between Nora Industries and Orkla Borregaard. Submitting the case to the Price Council, the Price Directorate advised the Council to instruct Orkla Borregaard to sell its shares in Freia Marabou A.S.

139. Nora Industrier, a concern spanning breweries, mills, food processing, chocolate and textiles, had a total turnover of NOK 7,332 million.

140. Orkla Borregaard owned two large units in the consumer market, AS Denofa og Lilleborg Fabriker and Stabburet AS. The concern also had a large block of shares in Freia Marabou which is a major competitor to Nora in the chocolate, sweets and snacks sectors. In 1990 Orkla Borregaard had a total turnover of NOK 8,133 million.

141. The Price Directorate found that even if the merger would tend to weaken competition in many fields, the result did not call for intervening against the merger.

142. As Freia Marabou is the main competitor to Orkla in the fields of chocolate and sweets, snacks and fruit syrups, the Price Directorate advised the Price Council to order Orkla Borregaard to sell its shares in Freia Marabou. The Norwegian snacks market was dominated by three producers: Maarud, a subsidiary of Freia Marabou, Idun, indirectly owned by Nora Industrier, and Polly, indirectly owned by Orkla. The merger between Orkla and Nora would bring the activities of Idun and Polly together and give them a market share of 40 per cent. Orkla and Freia Marabou would control 95 per cent of the market for snacks. For the two other sectors the market share would be 75 per cent and 70 per cent.

143. The fact that Orkla would be a major shareholder in Freia Marabou might, in the opinion of the Price Directorate, lead to reduced competition which may have serious detrimental effects.

144. The Price Council passed a decision according to the recommendation of the Price Directorate.

2. Criminal sanctions

Corrugated paper

145. The four largest producers of corrugated paper with an aggregate turnover of some NOK 900 million have been accused of rigging prices since 1983. The producers and their trade association, which has organized the collusion, have been reported to the police. The case is pending.

Steel wholesalers

146. In November 1991 six Norwegian steel wholesalers pleaded guilty to price rigging and paid fines totalling more than NOK 12 million. In addition seven personnel involved have paid fines of NOK 100,000 each.

Norsk Jernverk

147. In 1991 Norsk Jernverk accepted a fine of NOK 1,500,000 for having entered into price agreements with foreign steel mills, agreements which had effects on the Norwegian market.

3. The role of the Competition Authorities in the formulation and implementation of other policies

148. Laws and provisions issued by other government authorities may have harmful effects on competition and may lead to loss of efficiency. The Price Directorate has given its opinion on several provisions during the period.

Purchase of generic drugs by tender

149. In 1991 Ulleval Hospital, one of the largest hospitals in Norway, in an attempt to reduce cost, invited pharmaceutical firms to submit tenders for delivery of drugs to the hospital. The Association for Norwegian Representatives of Foreign Pharmaceutical Producers (No-Re-Farm) reacted to

the invitation by urging its members not to submit tenders. The Association claimed that tendering for drugs was against a principle laid down by government authorities that prices should be equal for drugs to all consumers irrespective of domicile. No-Re-Farm asked the Ministry of Health and Social Affairs for clarification. In a subsequent letter to Ulleval Hospital, No-Re-Farm told of having been informed by the Ministry of Health and Social Affairs that the Ministry would not accept a system of tenders in any form under the present policy. The Ministry referred to the fact that the Parliament Committee for Social Questions had stated as a matter of principle that the prices for drugs should be the same in all parts of the country. Requests for tenders would contravene this principle.

150. In advance of its invitation to submit tenders, Ulleval Hospital had put the question before the Directorate of Public Health. The Directorate maintained that the hospital was in every way free to request for tenders for drugs provided that deliveries were made through the Norwegian Medicinal Depot which has exclusive right to wholesale drugs in Norway. The gain accruing to the hospital as a result of the tendering could be transferred directly to the hospital by the successful suppliers.

151. From a competition point of view the Price Directorate found it most unfortunate that the Ministry tried to prevent the hospital from strengthening competition in the market for drugs. The use of tenders could reduce the outlay for drugs by some NOK 10 million a year by forcing the suppliers to reduce prices in order to succeed in having their bid accepted.

152. The Price Directorate found it strange indeed that the Ministry upheld a policy of equal prices when pharmacies, according to the provisions concerning prices on sale of drugs to hospitals issued by the same Ministry, at the same time are compelled to give hospitals a minimum discount of 2 per cent. The system of maximum prices for drugs would ensure that discounts under a system of tenders would reduce the total cost of drugs. In the opinion of the Price Directorate this would eminently meet the goal of the lowest possible prices for drugs. In choosing between a policy of equal prices and one of lowest prices, the latter ought to be given priority and not the former as the case seems to be today.

PHILIPPINES

153. The Government of the Philippines stated that the national policy against unfair competition is enshrined in the 1987 Constitution:

> "The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed." (Sect. 19, art. XII)

154. However, to date, there was only one provision of the Philippines Revised Penal Code on the matter, i.e. article 186 on "Monopolies and Combinations in Restraint of Trade", which punishes the following acts:

1. Entering into a conspiracy or combination in restraint of trade or to prevent by artificial means free competition in the market;

2. Monopoly of merchandise to alter prices by spreading false rumours or any other artificial means to restrain free competition in the market; and

3. Acts of manufacturers, producers, processors or importers prejudicial to lawful commerce.

155. From the date of effectivity of the Revised Penal Code on 1 January 1932, there have been no reported cases of successfully prosecuted violations of this Section. If there have been convictions, these are not presented in the Philippine criminal statute books. There have, however, been recent legislative proposals on the matter.

156. In the Senate, there is a bill entitled "An Act to Re-Examine, Realign and Recast into the Requirements of the Constitution the Laws Prohibiting Monopolies, Combinations in Restraint of Trade and Unfair Competition, and for Other Purposes". This bill is also known as Senate Bill No. 996, or the "Philippine Anti-Trust Act of 1989". [Copy available with the UNCTAD secretariat.]

157. Upon request of Senator Vicente T. Paterno, Chairman of the Committee on Economic Affairs of the Senate, this Commission commented on the proposed bill in its letter dated 29 September. [Copy available with the UNCTAD secretariat.]

158. This bill is still pending before the Senate. Details as to the scheduling/timetable of this bill can be obtained directly from the Committee Secretary, Senate Committee on Economic Affairs.

159. In the House of Representatives, there are three pending bills, namely:

1. H.B. # 23560 "An Act Against Lawful Restraints and Monopolies of Commerce" (Dragon & Monfort Bill):

160. This bill envisions the creation of a Philippine Anti-Trust Commission composed of a Chairman with one deputy Commissioner each for Luzon, Visayas and Mindanao. (The administrative set-up is similar to Senate Bill No. 996.) The proposed initial outlay is P 100 million. [Copy available with the UNCTAD secretariat.]

2. H.B. # 26204 "An Act Creating a Special Body that Shall Regulate and Exercise Authority over Monopolistic Practices, Combinations in Restraint of Trade and Unfair Competition as hereinafter defined and Appropriating Funds therefor" (Monfort Bill):

161. This bill envisions the creation of an Office of the Anti-Trust Prosecutor (referred to elsewhere in the bill as a Commission) with two deputy Anti-Trust Prosecutors presumably under the Department of Justice. [Copy available with the UNCTAD secretariat.]

3. H.B. # 26308 "An Act Implementing Section 19, Article XII of the 1987 Constitution, Defining and Prohibiting Monopolies and Combinations in Restraint of Trade, Providing Penalties for Violations thereof, and for Other Purposes" (Verano-Yap Bill):

162. This bill is more cost-conscious as it delegates the authority to existing agencies depending on the industry regulated, i.e., Land Transportation Office (LTO) for Common Carriers; Monetary Board (MB) of the Central Bank (CB) for banks, and the Bureau of Domestic Trade (BDT) of the Department of Trade and Industry (DTI). [Copy available with the UNCTAD secretariat.]

163. All these bills are still pending before Congress.

PORTUGAL

164. In Portugal, control of restrictive business practices is regulated under Decree-Law No. 422/83 of 3 December 1983, which text is reproduced in UNCTAD's Handbook TD/B/RBP/49 of 29 June 1988. The Government of Portugal submitted a summary of its legislation on concentrations (Decree-Law No. 428/88), which is reproduced below.

DECREE-LAW NO. 428/88

165. The increasing development of the Portuguese economy requires better transparency on the part of economic agents to ensure that competition on the market observes the rules of competition.

166. So far, important measures have already been taken, namely by Decree-Law No. 422 of 3 December 1983, which is commonly known as "Lei de Defesa da Concorrência" (Law of Competition Protection).

167. To amplify this law, techniques were implemented in order to prevent the effects of distorted competition. The decree-law aims at protecting economic agents, according to the guidelines of the EEC rules on concentration by firms.

168. Therefore, under article 201 (1a) of the Portuguese Constitution, the Government orders the following:

Article 1

(1) This law applies to concentration by firms in which one of the following conditions is found:

(a) The annual volume in sales is equal to or higher than 5,000,000,000 escudos as a result of a concentration;

(b) The market share for the respective main product or similar products as a whole resulting from concentration is equal to or higher than 20 per cent as to the Portuguese market or higher than 5 per cent as to the EEC market;

(c) The effects of concentration modify in great part competition on the markets of goods and services, except under the terms of article 15 (1) of Decree-Law No. 422 of 3 December 1983.

(2) These provisions do not apply to:

(a) Either banks or insurance companies;

(b) The reorganization of companies under a dominant position or in a group, as provided for in the "Código das Sociedades Comerciais" (Commercial Companies Code).

Article 2

(1) Concentration by firms exists in the cases of:

(a) Mergers and splitting up of two or more companies;

(b) An individual or a company exercises a determinant influence on another company.

(2) Determinant influence exists when:

(a) There is a dominant position or a group relation among the firms under the terms of the commercial companies code;

(b) An individual or a company acquires from another company at least 10 per cent of its social assets;

(c) An individual or a company acquires from another company a share higher than 10 per cent of its capital, with voting rights, and by the contract of society or parasocial agreements is entitled to adopt or prevent measures introduced by the general meeting or by the administrative body of the company from being taken or by contracts among companies is entitled to establish or to prevent any trade or investment policies, the application of technology and raw materials and the distribution of products belonging to the shared company.

(3) Influence exercised on dependent companies or companies in a group relation is very important according to the commercial companies code for the preceding paragraphs to take effect.

Article 3

(1) As to concentration provided for in article 1 (1) it is compulsory to declare the intent of acquisition to the Minister for Trade and Tourism, hereinafter called the Minister.

(2) This declaration must identify both the entity that promotes the concentration and partners and specify the purpose and type of same.

Article 4

(1) The Minister shall, then, decide:

(a) Not to comment, if the declaration does not reveal any distortion of competition;

(b) To submit the declaration to the "Conselho da Concorrência" (Competition Board) for appreciation. This Board was established under Decree-Law No. 422 of 3 December 1983;

(c) To oppose the project of concentration if it can cause the distortion of competition, namely if there is any possibility of an abuse of a dominant position on the part of the promoting entity or on the part of the economic group this entity belongs to, and in the cases provided for in articles 13 and 14 of Decree-Law No. 422 of 3 December 1983.

(2) No notification within fifteen working days, from the date of declaration, of any of the decisions in article 4 (1b and 1c) means there is no opposition to the project of concentration.

(3) The Minister may ask the Direçao-Geral de Concorrência e Preços (Directorate-General for Competition and Prices), hereinafter called DGCP, for further explicit information or other service. In this case, the period established in article 4 (2) shall be interrupted, the party concerned being informed thereof.

(4) The Minister may ask the Competition Board to consider the declaration, under the terms of article 4 (1b) when concentration can exert a negative influence upon competition in Portugal, especially when it:

(a) Reduces the number or the range of suppliers and consumers;

(b) Creates the conditions for a monopoly or a situation close to it;

(c) Harms the consumers' interest with regard to competition, prices or alternative supplying sources;

(d) Creates the conditions to hinder or to eliminate competition, namely by eliminating distribution networks;

(e) Distorts price structures by fixing prices on a discriminatory or abusive basis;

(f) Violates the rules on competition either for Portugal or the EEC.

(5) The Minister shall consider either the compatibility between concentration and economic policy or the possible effects of the following factors on free competition, here in Portugal or inside the European Community:

(a) The impact on employment figures, especially in areas of shortage of employment;

(b) Compatibility with the regional economic policy;

(c) Contributions to technological research, development, training and investment in Portugal.

(6) The Minister shall also consider eventual harmful effects on environment, on public security and health and on the appropriate application of natural resources.

Article 5

(1) Under the terms of these provisions the Minister shall specify the kind of information required when he asks the Competition Board to state its position.

(2) The Competition Board shall state its position within a time-limit of 30 working days unless it asks for further background information.

(3) The Competition Board's position is transmitted to the Minister for the final decision.

(4) Whenever necessary, the Minister may, on his own initiative or at the Competition Board's request, order a search to the DGCP that shall submit it to the Minister within a time-limit of six months.

(5) The Minister shall adopt a decision within fifteen working days, from the date of transmission of the Competition Board's position or from the date of receipt of the process, under the terms of the previous paragraph.

(6) In the cases provided for in the previous paragraph and in article 4 (1) (c), the decision of opposition shall be published in an order of both the Minister and the minister responsible for the economic sector which the company belongs to.

Article 6

(1) The Minister's order of opposition to concentration by firms under the terms of article 1 (1) declares void legal deals involving concentration.

(2) The order under the previous paragraph may be subject to appeal to the Supreme Court as provided for in the law.

(3) Any false notice of intent shall be reported to the Department of Justice for sanction.

(4) Professional secrecy is required from any intervenor in the process till the final decision.

(5) The proceedings provided for in this decree-law are free of charge.

Article 7

Public services and bodies that note any concentration, under this provision, as well as public accounts revisers in fiscal boards of the Portuguese companies involved, are obliged to report it immediately to the Minister's Cabinet if the notice provided for in article 3 (1) has not been given.

Article 8

In the absence of the compulsory notice [article 3 (1)] all legal deals involving concentration by firms, under the terms of article 1 (1), are declared void.

SRI LANKA

169. The Government of Sri Lanka submitted the following information:

(i) Introduction of new RBP legislation

170. The Fair Trading Commission was established under the Fair Trading Commission Act No. 01 of 1987 and was operative with effect from 1 August 1987.

(ii) Revision and/or amendment of existing RBP legislation

171. The only amendment to the Act was the repeal of Sections 18 to 26 of the Fair Trading Commission Act by the Industrial Promotion Act No. 46 of 1990, effective from 1 January 1991. With the repeal of these sections, the price supervision functions so far carried out by the Commission ceased to operate. Price control will be limited only to food and pharmaceutical items.

172. The Commission has also been given additional powers to examine "unreasonable" price increases of products under Section 23 of the Industrial Promotion Act and to recommend tariff adjustments. So far, eight inquiries have been carried out under this section and in none of these cases was there a necessity to make any recommendations regarding tariff adjustments.

(iii) Translation and dissemination of the Set and the organizing of contacts with the business community

173. The Commission is in close contact with the business community, i.e. the Trade Chambers, the Ministry of Industries and Technology, and other allied institutions. Under the privatization programme they also have been advised of the role of the Fair Trading Commission.

(iv) Exchange of information with foreign RBP control authorities

174. The Commission receives on a regular basis information from RBP authorities in the United Kingdom, Japan and Australia, but there has been no necessity to obtain information on specific issues.

(v) Notifications of and action taken against RBPs which adversely affect other countries, and which are caused by enterprises under the notifying country's jurisdiction

175. This has so far not arisen.

(vi) Consultations between countries on matters related to the control of RBPs with a view to reaching understandings

176. This has so far not arisen.

(vii) Organization of, participation in or provision of, financial and other resources for technical cooperation, advisory and training programmes on RBPs, particularly for developing countries

177. Under the technical assistance training programme, the German Foundation for International Development (DSE), in consultation with the German Federal Cartel Office and the German Federal Ministry of Commerce, arranged a training programme on the Enforcement of National Laws on Competition and Restrictive Business Practices in Bangkok (Thailand), from 16 to 20 September 1991. The Commission was requested to participate and four representatives were sent from the Fair Trading Commission and two from the Department of Internal Trade. The Commission records its deep appreciation for the training programme arranged for the developing countries.

178. The United Nations Conference on Trade and Development, in cooperation with the Korean Development Institute, arranged a symposium on Corporate Policies and Competition for Development in Seoul (Republic of Korea), from 11 to 13 September 1991, at which the Fair Trading Commission was represented.

Annual Report on restrictive business practices

179. The Annual Report for the year 1990 and a report on major activities of the Fair Trading Commission for the year 1991 were forwarded to the UNCTAD secretariat.

180. The Government of Sri Lanka also indicated that the proposed amendments to the Fair Trading Commission Act had now been approved by the Legal Draftsman and once Cabinet approval was obtained these amendments would be placed before Parliament. The proposed amendments will make notification of all likely merger situations mandatory, and the Commission shall, within 21 days of receipt of such notification, inform in writing whether the Commission has any objection to the proposed acquisition or that the Commission will communicate its decision after holding relevant investigations or inquiries. The proposed amendments also give the power to the Commission to examine merger situations on its own initiative.

181. The proposed amendments to Section 37 of the Fair Trading Commission Act provide that any person convicted of an offence under the Act relating to failure to provide information or furnish documents shall, within 14 days of

such conviction, furnish the return or information or produce documents requested, and on failure shall be liable to an additional fine at a rate of Rs. 500/- per day until the said return or information is furnished or the documents are produced, as the case may be, to the Commission.

TURKEY

182. The Government of Turkey submitted a note to the secretariat on its proposed draft competition law. The note is reproduced below.

183. At the present moment there is no competition law enacted in Turkey. During the last 14 years there have been several attempts to prepare a competition act. The first commission, set up in 1978 under the auspices of the Ministry of Trade and Industry, failed to bring the draft into existence. After 1980 Turkey adopted much more liberal economic policies, and a need to have an effective competition policy came out as a necessity of the system adopted by the 1982 Constitution, where a duty to pass a competition act was imposed on the subsequent parliaments.

184. In order to promote the competitiveness of Turkish industries in world markets and to be in accord with more democratic ideals, the present Government has made a great effort to prepare a new draft, that will probably be submitted to the parliament in the next parliamentary term. The new draft has been prepared by a group of academicians commissioned by the Ministry of Trade and Industry in the Competition Law Review Committee.

The rationale accepted by the Committee

185. The Committee takes the view that no legislation can force undertakings to compete, but it is hoped that by eliminating anti-competitive practice and encouraging market forces, the Act will be successful in promoting a greater degree of competition in the internal markets. The Committee regards competition as an effective means to achieve economic efficiency. It is believed that the Competition Act will play an important role in realizing more competitive market structures and hence, improve productive efficiency as well as allocative efficiency. The ultimate goal is to make full and more effective use of the scarce resources of the country.

186. There are various different views on industrial economics and the effect of competition policies on trade and industry. The Committee is aware of all these views, stressing that a perfect functioning market is a utopia, but still holds the idea that aiming for the ideal should be taken as the principle, as long as it does not create an obstacle to economic and technical progress. A lack of competition in the internal market increases the cost and places the private sector in the same situation as State-owned industries, which are quite unsatisfactory in terms of efficiency. In this respect, internal competition will help those firms that engage in international trade.

187. The Committee accepts the fact that each firm will try to monopolize its own market to raise monopoly profit. In a competitive market, the mechanism of monopolization is put in motion by improving productive efficiency or by innovation. Although this is in contradiction with competition ideals, the benefit to the society of these activities is far greater than any harm they cause.

188. Research and development expenditures are minimum in the country, and Turkey has been struggling with high inflation for the last 14 years. Turkish markets show the characteristics of oligopolistic and monopolistic markets. A few groups own almost all the major industries, and economic power is vested in the hands of a couple of people.

189. The Committee, for the reason given above, adopted a stricter position on competition policy, and the implementation of this policy will be carried out entirely by an autonomous authority.

General outline of the draft

190. The draft Act which will be debated in the Turkish parliament includes forbidden practices as well as procedural rules and the foundation of an independent authority. The principles laid down in the draft on the foundation of the authority and procedural rules are of extreme importance in terms of the implementation of an effective competition policy and show divergence from principles of Turkish Administrative Procedures.

191. The draft prohibits all kinds of agreements and practices contrary to the idea of competition, and the basic wording is adopted from article 85 of the Treaty of Rome. After the general definition, the acts which may be the result of prohibited agreements are listed as those:

- Directly or indirectly fixing purchase and selling prices or any other contractual conditions;

- Limiting or controlling production, market outlets or access, investment and technical development;

- Applying dissimilar conditions to equivalent transactions in commercial relations with other contracting parties for the same services, thereby placing them at an unjustified competitive disadvantage;

- Making the conclusion of contracts subject to acceptance by the other contracting parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject matter of such contracts.

However, this list is not exhaustive.

192. The draft also lays down the conditions under which exemption from the rigour of the Act can be granted by the Competition Authority. These conditions are very similar to the conditions set in article 85 (3) of the Treaty of Rome.

193. The draft forbids the abuse of dominant position within the national territory or in any part of it. To be a monopoly or the act of monopolization is not illegal per se. A list of situations that might be regarded as abuse of dominant position is also included in the draft. This list is not exhaustive either.

194. Acquisitions and mergers are also regulated in the draft. An advanced notice of acquisition or merger must be submitted to the Authority, and permission is necessary for the execution of the acquisition or merger agreements.

195. Turkish competition law experience is very premature at this stage. We must wait until the debates in Parliament are over and then make projects for the future.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

196. The Government of the United Kingdom submitted its annual report for 1991 containing, inter alia, the information reproduced below.

A. SUMMARY OF NEW LEGAL PROVISIONS IN COMPETITION LAW AND RELATED LEGISLATION

197. There are no changes to the existing competition legislation; in particular, legislation was not introduced in 1991 to implement the Government's proposals to reform the law on restrictive trade practices (see previous Annual Reports for July-December 1989, para. IB (i) and for 1990 para. IA (iv)). The following paragraphs detail secondary legislation affecting specific sectors, and prospective legislation concerned with the regulation of privatised public utilities.

(i) Fair Trading Act 1973 (FTA): Credit card services

198. Two pieces of legislation came into force on 28 February 1991 implementing the recommendations of the Monopolies and Mergers Commission (MMC) in their report on credit card services: The Credit Cards (Merchant Acquisition) Order (SI No. 2158 of 1990) prohibits certain restrictions placed by credit card organizations on those of their members wishing to become merchant acquirers. The principal restriction was that card issuers should have issued a certain number of cards before they could begin acquiring merchants.

199. The Credit Cards (Price Discrimination) Order (SI No. 2159) prohibits the rule imposed by credit card organizations that customers should not be charged more for a purchase by credit card than they would be for the same purchase paid for by other means, including cash. Retailers are therefore free to charge more for payment by credit card or to discount for payment by cash. The credit card companies are, however, free if they wish to require that any additional charge or discount be limited to the level of the merchant service charge paid by the merchant to the credit card company.

(ii) Restrictive Trade Practices Act 1973

200. Three orders were made concerning arrangements in the electricity industry. The Electricity (Restrictive Trade Practices Act 1976) (Exemptions) Amendment Order 1991 (No. 88) exempts certain agreements from the provisions of the Restrictive Trade Practices Act 1976. In addition, the Restrictive Trade Practices (Standards and Arrangements) (Goods) Order 1991 (No. 1896) and the Restrictive Trade Practices (Standards and Arrangements) (Services) Order 1991 (No. 1897) were enacted to approve certain electricity standards and arrangements for the purposes of the Restrictive Trade Practices Act 1976.

(iii) The Competition and Service (Utilities) Bill

201. This Bill, under which it is intended to introduce more competition in the supply of gas and water services, was published on 8 November 1991. It includes powers for the Government to end the monopoly which British Gas holds on supplying customers who use less than 25,000 therms a year (1 therm equals approximately 106 megajoules). A progressive opening of the market is envisaged, with the monopoly threshold being reduced - as a first step - to no less than 2,500 therms. This will increase competition in the supply of gas to medium-sized users. There will be a review in 1996, in the light of which a decision will be made on when to end the monopoly. The Bill also included provisions giving the Office of Gas Supply (OFGAS) powers to regulate on a separate basis the transportation and storage business of British Gas. This is preparatory to British Gas establishing a separate transportation and storage unit which will in future provide transportation and storage services on a transparent, non-discriminatory and unbundled basis, including dealing at arm's length with British Gas' own trading business.

202. The Bill will also increase competition in water services by removing the restriction which prevents anyone but the licensed supplier from supplying new customers within 30 metres of its pipes; allowing large users of water (currently defined as those using one megalitre of water a day) to be supplied by a company other than the company whose area they are in; giving the Office of Water Services (OFWAT) powers to require water companies to supply prospective competitors; and extending customers' rights to be connected to water mains or sewers near their property.

B. CHANGES IN COMPETITION LAW RULES, POLICIES OR GUIDELINES

(i) Respective functions of the Director General of Fair Trading and the Director General of Electricity Supply

203. Following the passing of the Electricity Act 1989 and the reorganization of the electricity supply industry, the Director General of Fair Trading (DGFT) reached agreement in 1991 with the Director General of Electricity Supply (DGES) on how they would divide responsibility for exercising their concurrent functions in respect of competition in electricity and related markets.

(ii) Mergers guide

204. A new edition of the booklet "Mergers - a guide to the provisions of the Fair Trading Act 1973" was published by the Office in May 1991. It replaces the version published in 1987. The new publication covers the changes introduced by the Companies Act 1989 (pre-notification, charging and divestment in lieu of reference) and refers briefly to the Europan Community Merger Regulation.

(iii) Cartel guidelines for Local Authorities

205. In February, the Office of Fair Trading (OFT) published a guidance booklet for local authority purchasing officers which aims to help them to identify and combat secret cartels. It describes some of the tell-tale signs and points out the remedies that are open to them, in particular the right to sue for damages for breach of the duty under the Restrictive Trade Practices Act 1976 to register restrictive agreements.

206. The booklet was followed in July by a revised version for wider distribution to some 10,000 purchasing departments in the private and public sectors of industry, higher educational establishments, regional health authorities and government departments.

(iv) Guidance on agreements in the bus industry

207. In July 1991 the OFT issued a guide on the working of the Restrictive Trade Practices Act 1976 aimed specifically at the bus industry. Until deregulation of the industry under the Transport Act 1985, the RTP Act did not apply to agreements between bus operators. Besides explaining the basic requirements of the Act, the new guide draws on the OFT's experience since deregulation to set out the view the DGFT is likely to take on the effect on competition of arrangements which bus operators most often want to make with each other.

(v) Application of EC rules in the national courts

208. With regard to significant national court judgements in 1991 involving the direct application of Community competition rules a judgement was given in the United Kingdom courts concerning article 86: Irish Aerospace (Belgium) NV v. European Organization for the Safety of Air Navigation and Another. The case concerned detention at Luton airports of an aeroplane, owned by Irish Aerospace (Belgium) Ltd, for alleged non-payment of charges for air navigation services. The judgement found that regulatory bodies performing the function of a public authority with the power to levy charges were not thereby a commercial organization and not therefore subject to the provisions of article 86.

C. INTERNATIONAL LIAISON

209. The OFT had a number of bilateral meetings with other competition authorities and interested parties from abroad. Visits to the United Kingdom were made by representatives of the Australian Attorney General's Office, the Australian Government Solicitor, the Australian House of Representatives Standing Committee on Finance and Public Administration, the Australian Trade Practices Commission, the Canadian Competition Tribunal, Investment Canada, the Czechoslovak Competition Authority, the Slovak Anti-Monopoly Department, the European Commission, the Confederation of Finnish Industry, the German Bundeskartellamt, the Government of Kerala State (India), the Confederation of Irish Industry, the Jamaican Prices Commission, the Japanese Fair Trade Commission, the Japanese Institute for Social and Economic Affairs, the

Japanese Federation of Bar Associations, the Netherlands Ministry of Economic Affairs, th New Zealand Commerce Commission, the Russian State Committee for Antimonopoly Policy and Promotion of New Economic Structures, the South African Financial Services Board, the Tunisian Ministry of the Economy, and UNCTAD. An official from the Kenyan Ministry of Finance was also seconded to the Office for nine weeks. Representatives from the Office visited Czechoslovakia, France, Jamaica, the Netherlands, The Russian Federation and the United States. The Office also represents the United Kingdom at meetings of the OECD Committee on Competition Law and Policy and its working parties. There were two meetings of the Committee and seven meetings of working parties in 1991.

210. The OFT made five notifications to other countries' competition authorities of action taken in the UK relating to enterprises under the other countries' jurisdiction.

D. REGULATION OF PRIVATIZED PUBLIC UTILITIES

211. Each regulator of the privatized public utilities publishes an annual report on its activities. Set out in this section is a summary of those activities which may be of interest.

(i) Telecommunications

Developments on the Duopoly Review

212. In March 1991 the Government, after consultation with the Director General of Telecommunications (DGTEL), published the conclusions of the Duopoly Review, a major review of competition policy in telecommunications, in a White Paper, "Competition and Choice: Telecommunications Policy for the 1990s" (Command Paper 1461). The main question raised by the review was whether or not the policy of restricting the provision of long-line, fixed link services to two companies, British Telecommunications plc (BT) and Mercury Communications Ltd (Mercury), should be ended. The Government concluded that the duopoly policy should cease and that, accordingly, they would consider applications from others for licences, under section 7 of the Telecommunications Act 1984, for the provision of fixed link services.

213. In September 1991, DGTEL modified the Conditions of the licences of BT and Mercury, to give effect to conclusions announced in the White Paper and to encourage the growth of effective competition. The key proposals, which applied to both licences, established arrangements for:

(a) Strengthening interconnection arrangements, with provision for costs to be borne equitably, provision for penalties for late connection, provision for standard tariffs and improved enforcement arrangements;

(b) Providing for equal access to long-distance operators to allow customers a simplified choice;

(c) Enabling the Office of Telecommunications (OFTEL) to take over the administration of the numbering scheme and for introducing number portability to assist the establishment of effective competition;

(d) Requiring the respective operators to provide private circuits to other public telecommunication operators (PTOs), subject to certain conditions;

(e) Enabling retailers of telecommunications services to enter the market;

(f) Requiring each licensee to allow other operators access to its directory information database for the purpose of dealing with directory inquiries and routing calls; and

(g) Giving DGTEL the power to specify essential interfaces which the licensee should make available in compliance with specified standards, in the interests of effective competition.

214. Other key proposals, which would apply only to BT's licence, were as follows:

(i) The inclusion of international calls in the basket of services which are subject to the main price control rule; the consequent tightening of the control from RPI-4.5 to RPI-6.25; and an initial reduction of at least 10 per cent in the prices of international calls;

(ii) The establishment of arrangments to clarify BT's scope for introducing quantity discounts and other special tariffs; and

(iii) The establishment of arrangements for access deficit contributions to be paid by competitors seeking interconnection with BT's network except that DGTEL has the flexibility to waive access deficit contributions in certain circumstances, while giving BT the assurance that it would definitely receive access deficit contributions if its market share fell below 85 per cent. These waiver arrangements would allow competitors to become established in the market, taking account of the difficulties which new entrants are likely to experience in their early years.

215. Towards the end of 1991, OFTEL commenced discussions with other PTOs or their representative bodies (e.g. Kingston Communications, the cable operators) with a view to initiating modifications to the Conditions of their licences, as appropriate, to implement the conclusions of the duopoly review. By the end of the year, 18 new licence applications had been received by the Department of Trade and Industry (DTI) and OFTEL will be actively involved with the DTI in considering new applications and drawing up detailed licences.

216. The White Paper referred to the interconnection of systems and, identifying the key importance of open network connection and interconnection (paras. 7-32), envisaged the establishment of a United Kingdom consultative forum in which operators, manufacturers and users can address the standards and related technical issues associated with introducing more competition. Since interest in these issues extends to many different groups, and it would be impractical and inefficient to form a single large committee for everyone to attend, OFTEL proposed (subject to discussion on detail) to establish a Network Standards Coordination Committee composed of appointed members from recognized Interest Groups. Accepting that various existing Associations and

Committees already provide a means of exchanging ideas and establishing consensus on a wide range of telecommunications matters, such Associations and Committees should be well placed to represent their member's interests, on the Coordination Committee, the main function of which would be to advise DGTEL. One form of advice would relate to Optional Interfaces, which would be subject to voluntary conformance but documented in public Reference Standards to encourage competition. The other form of advice would relate to Essential Interfaces which would be subject to madatory conformance with Designated Standards. The Coordination Committee will need to be aware of European initiatives and ensure that relevant Directives, Recommendations and Proposals are taken into account.

(ii) Gas

217. In February 1991, the Office of Gas Supply (OFGAS) took enforcement action under the Gas Act 1986 against British Gas to require the company to supply gas to two power station projects. OFGAS believed that British Gas was unfairly refusing to supply these customers and discriminating against them as newcomers to the power generation market in favour of established members of the electricity supply industry who were receiving supplies of gas from British Gas. British Gas at first refused to acknowledge the validity of the enforcement orders made against it. However, by September and under threat of further enforcement action by OFGAS, the company agreed to settle claims for damages on behalf of the two generators, rights which had been created as a result of the enforcement action taken in February. British Gas also agreed to recommence supplies to the electricity generation market on a basis which did not discriminate between newcomers and existing players.

(iii) Electricity

218. Following the receipt of complaints about large increases in Electricity Pool prices, the Director General of Electricity Supply (DGES) launched an investigation into the operation of the Electricity Pool of England and Wales. He concluded that the two principal generators, National Power and PowerGen, had been able to increase and control Pool prices significantly. This was thought unlikely to inspire confidence in the Pool, or be conducive to futher new entry. Two major changes were proposed.

219. First, a new licence condition to be imposed on National Power and PowerGen to prohibit monopolistic and anti-competitive behaviour. It would also oblige them to publish information on plant availability, and establish arrangements for ascertaining whether others would be willing to buy stations to be closed. Second, the two companies will be called upon to explain their bidding for constrained-on plant (plant forced to run because of constraint on the transmission system). DGES did not make a reference to the MMC but would do so if consumers and suppliers were inadequately protected by competition.

220. At the end of the year the Office of Electricity Regulation (OFFER) was considering a complaint by the Kingfisher Group plc concerning the issue of "Free" electricity stamps by Eastern Electricity against the purchase of electrical goods from Eastern Electricity Retail Stores. This was being considered from the point of view of the enforcement of Eastern Electricity's licence conditions.

III. REPLIES OF REGIONAL GROUPINGS OF STATES

COMMISSION OF THE EUROPEAN COMMUNITIES

221. The Commission submitted its report which is reproduced below.

222. 1991 was the first full year of operation of the new merger control Regulation. Firms now have only one single Commission procedure to deal with and are notifying at an early stage. While most decisions under this Regulation have been well accepted, the Aerospatiale - Alenia/de Havilland case led to a certain amount of discussion in EC member States and the European Parliament. The Commission reaffirmed its position that an effective competition policy is an essential part of its industrial strategy.

223. The application of competition rules to the motor vehicle sector was clarified. In the Peugeot/Eco System decision 1/ and in the Notice concerning clarification on car intermediaries, 2/ the Commission provided the necessary guidelines to define more clearly selective distribution systems compatible with Regulation 123/85.

224. In 1991 the Commission reviewed its policy as regards cooperative joint ventures and is preparing a notice to clarify the area. Extensions of block exemptions are being prepared to permit a wider range of cooperative joint ventures. This is subject to the condition that competition in the relevant market is not jeopardized.

225. The ECSC Decision No. 25-67 which requires prior authorization of certain types of concentrations of undertaking was amended. 3/ The changes reflect the changes in production structures, markets and competition since the last amendment in 1978.

226. The Commission issued guidelines explaining the general principles of competition rules as they apply to telecommunication organizations, 4/ and the relationship of these rules to the competition rules applicable to member States and to other Community law. They make it clear that articles 85 and 86 of the EEC Treaty can be applied directly in so far as the undertakings act autonomously. Also, recourse can be had to article 90 of the EEC Treaty to the extent that their action is attributable to the public authority. The guidelines balance the need for cooperation betwen public operators with the need to prevent artificial barriers to competition.

227. The Commission has also been active in the international dimension, concluding agreements with EFTA countries, the United States of America, Poland, Hungary, and the Czech and Slovak Federal Republic (CSFR).

228. The agreement concluded with the United States in September 1991 seeks ways of cooperating to make enforcement activities of both parties more effective. It is based on the principles of notification, consultation and mutual assistance. Important areas developed are that each jurisdiction should have regard to the other's interests in employing its competition rules ("negative comity"). Furthermore where the important interests of one party

are being affected by restrictive busines practices in the other, it may call upon that other party to take enforcement action under its laws ("positive comity"). This provides for a greater level of cooperation than the 1986 OECD Recommendation concerning cooperation between member countries on restrictive business practices affecting international trade.

229. In international fora during the GATT discussions in 1991 the Commission has continued to press for progress with proposals to strengthen international competition. Competition issues have been discussed in a number of areas, such as State aids, trade in services, trade-related investment measures and trade-related aspects of international property rights.

230. In October 1991 the Japanese Fair Trade Commission and representatives of the EC met in Tokyo to discuss the role of competition policy and in particular the new "Administrative Guidelines" of the FTC and how they could deal with anticompetitive practices in the Japanese distribution system, as well as "keiretsu".

231. In the OECD forum the Committee on Competition Law and Policy met twice and discussed the draft Canadian Merger Guidelines, the Japanese Antimonopoly Act Guidelines, and the proposed new competition law in Sweden. In addition, following the OECD Ministerial meeting the Committee selected priorities for work in the next three years. These will be an examination of the scope for convergence in merger notifications and procedures, and of the growing links between competition and other policies, as well as a study on the objectives of competition policy.

232. The creation of the European Economic Area (EEA) extends the four freedoms of the EEC Treaty to all EFTA countries, and also means that the same competition rules will apply to all trade between the 19 contracting States from January 1993. It creates a "one stop shop" with identical substantive laws. This means that economic operators need only be cleared by one competition authority. The clearance procedure is thus simplified and speeded up.

233. The EEA establishes a unique "two pillar" system. The EFTA Surveillance Authority which has powers similar to the Commission will handle cases involving trade between EFTA countries. The EFTA "pillar" will also deal with cases involving one EC State and an EFTA State where 33 per cent of turnover is generated in the EFTA State. In addition, the EFTA "pillar" may consider cases which affect trade between EC States and EFTA States but which the EC "pillar" considers "de minimis". The Commission will continue to handle cases which would previously have fallen to it.

234. In December 1991 agreements were signed with Hungary, Poland and the CSFR. These agreements go far beyond what is contained within "traditional" free trade agreements and can be considered an important step in the integration of those countries in the future architecture of Europe.

235. The agreements cover a large array of subjects including competition. The competition provisions cover not only cartels, abuses of dominant positions and State aids, but also State monopolies of a commercial character and companies which have been granted special or exclusive rights. The agreements will be interpreted in the same way as the corresponding EEC or ECSC rules. Rules regarding implementation are currently being developed. Similar agreements are being negotiated with Romania and Bulgaria.

236. The Commission has extended technical assistance to a number of countries following an increasing volume of requests. In particular, assistance was given to Eastern and Central European countries and countries with which the Community has concluded or is negotiating agreements which contain provisions on competition policy.

Notes

1/ OJ L 66 11 March 1992, p. 3.

2/ OJ C 329 18 December 1991.

3/ Decision No. 3654/91/ECSC OJ L 348 17 December 1991.

4/ OJ C 233 6 September 1991.